Office - Supreme Court, U.S.
FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-642

IN THE

Supreme Court of the United States

October Term, 1982

ANDRE FRANKS,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD L. GOERWITZ, JR.
Counsel of Record

PAUL F. X. GALLAGHER
Attorney for Respondent

GALLAGHER, WHEELER, REILLY AND LACHAT
1412 PSFS Building
12 S. 12th Street
Philadelphia, Pennsylvania 19107
215-592-9800

International Printing Co., 711 So. 60th St., Phila., Pa. 19143 — Tel. (215) 727-8711

QUESTION PRESENTED

Was the Trial Court's charge to the jury, relating to a claim under the Federal Employers' Liability Act and the law applicable thereto, adequate insofar as stating the essential elements of such a claim and, therefore, not reversible error?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
REASON FOR DENYING THE WRIT	2

TABLE OF AUTHORITIES

Cases:

DePascale v. Pennsylvania Railroad Co., 180 F. 2d 825 (3rd Cir. 1950) 7

Dilley v. Chesapeake & Ohio Ry. Co., 327 F. 2d 249 (6th Cir. 1964) 7, 8

Gowins v. Pennsylvania Railroad Co., 299 F. 2d 431 (6th Cir. 1962) 7

Holloway v. J. B. Systems, Ltd., 609 F. 2d 1069 (3rd Cir. 1979) 8

James v. Continental Insurance Co., 424 F. 2d 1064 (3rd Cir. 1970) 3

Menke v. Southern Ry. Co., 603 F. 2d 1281 (3rd Cir. 1979) .. 2, 3

Robak v. Pennsylvania Railroad Co., 178 F. 2d 485 (3rd Cir. 1949) 3

Terminal R. Ass'n of St. Louis v. Fitzjohn, 165 F. 2d 473 (8th Cir. 1948) 2

Terminal R. Ass'n of St. Louis v. Howell, 165 F. 2d 135 (8th Cir. 1948) 2

Weese v. Chesapeake & Ohio Ry. Co., 570 F. 2d 611 (6th Cir. 1978) 7

Statutes and Rules:

Federal Employers' Liability Act:

Section 1 (45 U. S. C. § 51) 1, 2

Section 4 (45 U. S. C. § 54) 7, 8

Federal Rules of Civil Procedure, Rule 51 9

STATEMENT OF THE CASE

The within action was tried before a jury between June 15, 1981 and June 19, 1981. The jury returned a verdict in favor of Plaintiff in the amount of $15,000.00, which was reduced by the Court to $3,750.00, in accordance with the jury's finding of 75% contributory negligence.

Plaintiff, Andre Franks, instituted the within action on or about January 21, 1980, alleging he sustained injuries while operating a machine known as a "tie plugger". Said action was instituted pursuant to the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. Plaintiff sustained said injuries when he slipped on oil which he alleged leaked from the "tie plugger" machine.

At trial, conflicting evidence was presented regarding Plaintiff's use of the machine and the jury found the Plaintiff to be 75% contributorily negligent.

Plaintiff's Motion for New Trial was denied. Plaintiff appealed to the United States Court of Appeals for the Third Circuit, which affirmed the judgment and denied Plaintiff's Petition for Rehearing.

REASONS FOR DENYING THE WRIT

Petitioner avers that the Trial Court's failure to utilize the statutory language of the Federal Employers' Liability Act, 45 U. S. C. § 51, et seq., in its charge to the jury, as well as its failure to mention the particular statute by name, resulted in reversible error. Petitioner cites *Terminal R. Ass'n of St. Louis v. Howell*, 165 F. 2d 135 (8th Cir. 1948) and *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948) for the proposition that when the law governing a case is expressed in a statute, the Court, in its charge, must use the language of the statute. Petitioner states that not only did the Trial Judge refuse to charge the jury on the law applicable to a case under the Federal Employers' Liability Act, he refused to even mention the Act.

Petitioner's reliance on the above mentioned cases is misplaced. These decisions reveal that the Trial Court used the statutory language of the Act in its charge to the jury. The defendant objected to the use of the statutory language, and the Circuit Court of Appeals for the Eighth Circuit held that the use of the statutory language was permitted in a charge to a jury.

The issue before this Honorable Court is not whether a Trial Court must employ the exact statutory language in its charge to a jury, but, rather, is the charge taken as a whole, so inadequate as to constitute reversible error? The Trial Judge, as well as the Court of Appeals for the Third Circuit, ruled that the charge to the jury was adequate. The Court of Appeals for the Seventh Circuit in *Menke v. Southern Ry. Co.*, 603 F. 2d 1281 (7th Cir. 1979), has ruled:

> This court has previously expressed its opinion that the setting forth of instructions in statutory language is a practice which is not to be commended. (Cita-

> tion omitted). On the other hand, "[i]n itself there is nothing improper in charging a jury in the language of a statute, when one of the issues in the case is whether the statute was breached." (Citation omitted). Thus, as with other matters concerning the form of instructions, whether to instruct the jury in the language of the relevant statute is generally a matter left to the discretion of the trial judge. *Id.* at 1284.

Thus, the law is clear that whether or not to employ the statutory language in a charge to a jury is left to the discretion of the Trial Judge. *Menke, supra.* As long as the charge fairly presents the necessary legal instruction, and the questions which the jury had to resolve, there can be no reversible error. *Robak v. Pennsylvania R. R. Co.*, 178 F. 2d 485, 486 (3rd Cir. 1949).

It is clear that there is no requirement that a federal jury must be charged by reading the formal language of the applicable statute. *Robak, supra* at 486. Furthermore, "a party has no vested interest in any particular form of instruction; the language of the charge is for the trial Court to determine. If, from the entire charge, it appears that the jury has been fairly and adequately instructed . . . then the requirements of the law are satisfied." *James v. Continental Ins. Co.*, 424 F. 2d 1064, 1065 (3rd Cir. 1970).

The learned Trial Judge fairly and adequately instructed the jury as to all of the elements regarding the Defendant's responsibilities to Plaintiff under the Federal Employers' Liability Act. The Trial Judge properly instructed the jury as to the degree of negligence needed to impose liability on the part of the defendant:

> Now in talking about whether the negligence caused the accident. I do not mean that Amtrak's negligence

> must have been the only cause, provided that it was a contributory cause. So long as it was one of the causes, that would suffice to make out liability on the part of Amtrak to Mr. Franks; that is to say, if you find by a preponderance of the evidence that defendant's negligence played some part in causing the injuries suffered by Mr. Franks, you will write after question two "yes" on the verdict form or you will check "yes" on the verdict form. . . .
>
> Now, what is the reason for this question? The question here assumes, of course, that you will have already said "yes" to the first two questions, meaning that you will already have found that Amtrak was negligent in some respect and that the negligence was at least contributed to the accident in which Mr. Franks was hurt. (N. T.: 5.65-5.66; Petitioner's Brief A20-A21).

The Learned Trial Judge properly instructed the jury as to all aspects of the law of comparative negligence as it applies to the instant action. The pertinent portion of the Judge's instructions to the jury on the law of comparative negligence was:

> You will recall from what Mr. Gallagher has said that it is the position of Amtrak and Mr. Gallagher's witnesses have, in Mr. Gallagher's view, put forward evidence to support this, that it is the position of Amtrak that this accident would not have happened if Mr. Franks had put the gears of the tie plugger which he was operating into neutral or had taken some other appropriate precaution. The question asked here, question three, is whether at least, in some part, it was negligence on Mr. Franks' part which contributed to this accident.
>
> Now, in considering the question whether Mr. Franks was negligent in some fashion that helped bring about

the injuries he suffered, you must bear in mind that on this single issue, unlike the rest of the case, on this single issue it is the defendant, Amtrak, which has the burden of proving by a preponderance of the evidence that negligence that it attributes to Mr. Franks.

Now, clearly, if Amtrak was right, in your judgment, in saying that Mr. Franks was negligent and his negligence was the sole negligence that caused the accident, then we never would have gotten past question two because you would already have concluded that it wasn't the negligence of Amtrak that contributed to this accident, but if you have already concluded (a) that Amtrak was negligent and (b) that negligence contributed to Mr. Franks' injuries, then you have to consider whether there was also some negligence on Mr. Franks' part that contributed to Mr. Franks' injuries, but there it is up to Amtrak to bear the burden of proving by a preponderance of the evidence that Mr. Franks was negligent in some measure . . .

Now, suppose you conclude that there was some negligence on Mr. Franks' part that contributed to his injury. I say suppose that you concluded that . . . . Under those circumstances, this verdict form asks you to go on to question number four.

In answer to question four you have to say: Well now, how much of the negligence was the railroad's and how much was Mr. Franks'? Was it half and half or was one of them more negligent than the other, and, if so, how much more? Now in asking this, I appreciate this is a hard thing to quantify, but that's your job . . . you have to be sure that they add up to one hundred and that's why it says [on the verdict form] "Total—100 percent" under there. . . .

> Now, I think you appreciate from what I have said that you only get to question number four if you have answered "yes" to question number three; that is, that you have said that Mr. Franks wasn't negligent in any way that contributed to the injuries then you don't have anything to allocate. Then there wouldn't be any negligence on Mr. Franks' part to plug into question number four [which requires an allocation of percentages of negligence]. So you only get to question number four if you have answered "yes" to question three . . .
>
> The reason for question four, assuming that you address question four, is that in the event that you have found some contributory negligence on Mr. Franks' part, then the law that governs a case of this sort requires an allocation of the damages as between—based on your determination as to the allocation of negligence. So that whatever figure of damages you would conclude were the damages suffered by Mr. Franks would then be reduced by such amount as you concluded the plaintiff was accountable for through his negligence, . . ." [N. T.: 5.66-5.70; Petitioner's Brief A21-A23].

Furthermore, the Trial Judge properly instructed the jury on Defendant's duty to provide employees, such as the Plaintiff with a reasonably safe place to work, as well as Defendant's duty to those engaged in Defendant's employment. The Learned Trial Judge's charge was, in pertinent part:

> Now, Mr. Franks, through his attorney, Mr. Hankin, and his witnesses, Mr. Franks argues, in effect, that the defendant, Amtrak, first of all, failed to give Mr. Franks a safe place to work, namely that allegedly defective machine, the tie plugger and, second, failed

> to give Mr. Franks adequate supervision in training with respect to how to maintain and repair that tie plugger, that assertedly unsafe tie plugger . . . However, if you conclude by a preponderance of the evidence that defendant, Amtrak, was negligent in one or more of the ways that I have mentioned, you will write "yes" in answer to question one [the question states, "Do you find the defendant, National Railroad Passenger Corporation, Amtrak, negligent?"] and then you will go to question two.
>
> . . . [I]t [Amtrak] owes to Mr. Franks a duty of reasonable care; that is to say, it must not fail to do what a reasonable person would do in like circumstances, to insure, not in a sense of guarantee, but simply to make provision for the safety of somebody engaged in the occupation which Mr. Franks was engaged in. [N. T.: 5.84-5.85; Petitioner's Brief A19-A20].

Petitioner further avers that the Learned Trial Judge failed to charge the jury that assumption of risk was not a defense under the Federal Employers' Liability Act, 45 U. S. C. § 54. Whether or not to give a charge on the assumption of risk is within the discretion of the Trial Judge. See e.g., *Dilley v. Chesapeake & Ohio Ry. Co.*, 327 F. 2d 249, 253 (6th Cir. 1964). Additionally, refusal to provide instructions on assumption of the risk is not error where the instruction on contributory negligence of a railroad employ, suing under the FELA, is correct. *Gowins v. Penna. R. R. Co.*, 299 F. 2d 431, 433 (6th Cir. 1962); *DePascale v. Penna. R. R. Co.*, 180 F. 2d 825, 827 (3rd Cir. 1950). In fact, many courts hold the assumption of risk charge should not be given at all, since assumption of risk is not an issue in a lawsuit brought under F. E. L. A. (See e.g., *Weese v. Chesapeake & Ohio Ry. Co.*, 570 F. 2d 611, 614 (6th Cir. 1978), and cases cited therein; *Gowins v. Pennsylvania R. R. Co., supra*).

In *Gowins v. Pennsylvania R. R. Co., supra* at 433, the Court held:

> Assumption of risk as a defense, where there is negligence on the part of the employer, has been written out of the Act. But when used in the sense that the employer is not liable for risks which it could not avoid in the observance of its duty of care, it has not been written out of the law. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, concurring opinion of Mr. Justice Frankfurther at page 72, 63 S. CT. 444, 453 87 L. Ed. 610 where it was said, "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury it is bound to create confusion. It should therefore, be discarded." Assumption of risk was not pleaded as a defense by the appellee. Contributory negligence was pleaded by appellee and under that issue an instruction permitting the jury to consider appellant's actions in the light of a dangerous condition known to him was proper. Section 53, Title 45 U. S. C. A., *Chicago St. P. M. & O. R. Co. v. Arnold*, 160 F. 2d 1002 C. A. 8th. If the instruction on contributory negligence was a correct one, we do not think it was error to refuse to instruct on the question of risk, *DePascale v. Pennsylvania R. Co.*, 180 F. 2d 825, 827, C. A. 3rd.

Clearly the failure to charge on Section 54 of the FELA cannot constitute reversible error.

Having discussed the merits of Petitioner's argument, it should be further noted that Petitioner failed to make a timely objection or take a timely exception to the failure to charge the jury on Section 54 of the FELA. Rule 51 of the Federal Rules of Civil Procedure precludes a challenge to jury instructions on appeal when the party fails to

take an exception at time of trial. *Holloway v. J. S. Systems, Ltd.*, 609 F. 2d 1069, 1073 (3rd Cir. 1979).

Petitioner further complains that the Learned Trial Judge failed to refer to the FELA by name. It should be noted that not only did the Learned Trial Judge properly instruct the jury as to each and every element under the Act, he also took the time during the course of the trial to explain to the jury the applicability of the FELA:

> The law under which the plaintiff sues is a law of Congress, which provides for recovery in the event of negligence on the part of railways operating in interstate commerce where such negligence causes harm to persons who are employees of said railroads; that is, it is a special federal statute which deals with the protection of railway employees and that follows from Congress' authority to regulate railroads as instruments of the national commerce . . . [N. T.: 1.12].

Petitioner cannot complain that the Learned Trial Judge failed to specifically mention the FELA in its charge. To the contrary, although the Learned Trial Judge may not have mentioned the Act by Name, the Trial Judge did explain its significance to the jury.

Respondent submits that the United States Court of Appeals for the Third Circuit did not render a decision in conflict with the decision of other federal and state Courts on the same matter. The standard to be applied in such a case is whether the charge to the jury, taken as a whole, is adequate. If the charge to the jury is determined to be adequate, then the Learned Trial Judge's failure to employ specific statutory language or to mention the Act by name cannot constitute reversible error.

For all the above mentioned reasons, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

RICHARD L. GOERWITZ, JR.
Counsel of Record

PAUL F. X. GALLAGHER
Attorney for Respondent